

UNITED STATES OF AMERICA
POSTAL REGULATORY COMMISSION
WASHINGTON, DC 20268-0001

Before Commissioners:

Michael Kubayanda, Chairman;
Ann C. Fisher, Vice Chairman;
Mark Acton;
Ashley E. Poling; and
Robert G. Taub

Transfer of Bound Printed Matter Parcels
to the Competitive Product List

Docket No. MC2021-78

ORDER DENYING REQUEST TO TRANSFER BOUND PRINTED MATTER
PARCELS TO THE COMPETITIVE PRODUCT LIST

(Issued February 10, 2022)

I. INTRODUCTION

On March 26, 2021, the Postal Service filed a request with the Commission to: (1) remove Bound Printer Matter (BPM) Parcels from the Market Dominant product list; and (2) add “Parcel Select Bound Printed Matter,” a nearly identical product, to the Competitive product list.¹ The Postal Service’s request to modify the Market Dominant and the Competitive product lists is filed under 39 U.S.C. § 3642 and 39 C.F.R. § 3040.130 *et seq.*

¹ United States Postal Service Request to Transfer Bound Printed Matter Parcels to the Competitive Product List, March 26, 2021, at 1 (Request).

This is the fifth such transfer the Postal Service has requested. Request at 1. The products that were the subjects of the four previous transfer requests were general-purpose parcel products operating in the same segments of the general parcel market as competitors' products.² Those transfer requests were each ultimately approved by the Commission based on the Postal Service's demonstrated lack of a dominant market share within those segments of the general parcel market.³

The instant request is distinguishable from these previous transfers by material facts in the record indicating that BPM Parcels is not a general-purpose parcel product, but instead a niche product for which competitors' general parcel offerings are not effective substitutes. As discussed below, based on this record, the Commission finds that BPM Parcels operates in a narrow submarket of the general parcel market and has no effective competition from other firms within that submarket. Based on this dominant market share, the Commission finds that the Postal Service exercises sufficient market power over the sale of BPM Parcels to preclude its transfer to the Competitive product list under 39 U.S.C. § 3642(b)(1). The Commission therefore denies the Request.

II. OVERVIEW

A. Postal Service Proposal

The Postal Service describes BPM Parcels as a commercial parcel product within the Package Services class. Request at 2-3. Individual pieces may weigh up to 15 pounds and contain printed matter consisting of advertising, promotional, directory, or editorial material, including books. *Id.* at 3-4. As set forth in the Domestic Mail

² See Section III.A., *infra*.

³ Docket No. MC2010-36, Order Conditionally Granting Request to Transfer Commercial Standard Mail Parcels to the Competitive Product List, March 2, 2011, at 14-15 (Order No. 689); Docket No. MC2011-22, Order Adding Lightweight Commercial Parcels to the Competitive Product List, April 6, 2011, at 6 (Order No. 710); Docket No. MC2012-13, Order Conditionally Granting Request to Transfer Parcel Post to the Competitive Product List, July 20, 2012, at 5-6 (Order No. 1411); Docket No. MC2015-7, Order Conditionally Approving Transfer, July 20, 2017, at 31-33 (Order No. 4009).

Manual (DMM), the material must be bound by permanent fastening and a minimum of 90 percent of the sheets of such material must be imprinted by a process other than handwriting or typewriting. *Id.* at 4 (citing to DMM § 263.2.1.d-g). Payment is required by permit, and the product offers different rates and payment structures for non-presorted mailings and multiple types of presorted mailings. *Id.*

The Postal Service notes that the Commission has found that parcels are very broadly defined, and that the variety of products within the overall parcels market makes it more meaningful to examine market power on the appropriate market segment rather than the overall parcels market. *Id.* at 5. The Postal Service references the Commission's statement that to determine the relevant market segment, the Commission looks to the characteristics of the parcel products themselves, such as package size and weights, customers, methods of transportation, pricing, content restrictions, piece minimums, and preparation requirements. *Id.* (citing to Order No. 4009 at 14-20).

The Postal Service identifies product characteristics it deems relevant to determining the market segment for BPM Parcels as inexpensive price, ground delivery, light- to moderate-weight, containing books, catalogs, and similar printed matter to individuals and business, in non-commercial quantities. *Id.* at 6. The Postal Service notes that the Commission has stated that determination of which products should be included in the relevant market or market segment is a function of whether the products are reasonably interchangeable, and that market definition focuses on demand substitution.⁴

The Postal Service contends that BPM Parcels competes against United Parcel Service (UPS) and FedEx Corporation (FedEx), specifically with the UPS Ground and FedEx Ground products. Request at 7. With regards to these products, the Postal

⁴ *Id.* (citing to Docket No. MC2013-57 and CP2013-75, Order Denying Request, December 23, 2014, at 18 (Order No. 2306)).

Service states “[t]hese products are not only reasonably interchangeable with BPM Parcels, they are, in fact, interchangeable. Any package a customer could send using BPM Parcels, it could, in the alternative, send as a UPS or FedEx Ground package.” *Id.*

The Postal Service concedes that UPS Ground and FedEx Ground are more expensive products than BPM Parcels. The Postal Service notes that a non-presorted BPM Parcel in Zone 1 & 2 costs \$2.71 to \$4.90 (based on weight), while the most comparable prices for UPS Ground and FedEx Ground range from \$8.76 to \$13.28 based on weight up to 15 pounds, with the two identified competitors charging within a few cents of each other. See *id.* The Postal Service states that the higher prices charged by UPS and FedEx pay for additional features, such as a 5-Day delivery guarantee and a much higher weight limit. *Id.* The Postal Service additionally notes that UPS and FedEx commercial customers generally pay negotiated (*i.e.*, lower) rates rather than listed rates. *Id.* at 7-8.

The Postal Service also contends that BPM Parcels competes against hybrid products offered by UPS, FedEx, and other large competitors that “resell BPM Parcel delivery to their customers and use the Postal Service for delivery by entering packages into the mailstream as BPM Parcels.” *Id.* at 8.

The Postal Service relies on the existence of the robust competition it claims is provided by these competitors to claim that it does not exercise sufficient market power over BPM Parcels so as to require the product to remain on the Market Dominant product list under 39 U.S.C. § 3642(b)(1). *Id.* at 10. As additional support for that claim, the Postal Service notes that many of the largest customers of BPM Parcels are themselves competitors with their own end-to-end delivery networks, permitting potential in-house diversion of BPM Parcels volume if the Postal Service tries to significantly increase its prices or degrade its service. *Id.* at 10-11. As evidence suggesting that such in-house diversion is not merely hypothetical, the Postal Service provides an excerpt from a UPS union contract that requires UPS to retain for in-house delivery (rather than enter into the BPM Parcel mailstream) some of its hybrid packages

in areas of sufficient delivery density, and reports customer anecdotes of hybrid SurePost boxes labeled for Postal Service tracking instead being delivered by UPS drivers. *Id.* at 12.-13. As further evidence, the Postal Service notes that UPS offers certain customers the ability to pay an additional fee to have hybrid SurePost packages delivered by UPS rather than the Postal Service. *Id.* at 13. The Postal Service also points to retailers delivering, or seeking to deliver, their own packages through their own last-mile delivery networks rather than delivering them through the Postal Service. *Id.*

With regards to the views of the customers, the Postal Service notes that service standards for BPM Parcels will remain the same after the proposed transfer, so customer concerns will be focused primarily on price and the inability post-transfer to rely on prices being subject to the Market Dominant price cap. *Id.* at 14. The Postal Service claims that, since BPM Parcels customers are “overwhelmingly highly sophisticated commercial entities,” BPM Parcels customers would be able to shift their volume quickly to competitors and thus do not require the protection of the Market Dominant price cap. *Id.* at 14-15. The Postal Service notes that customers concerned about the cost of delivering educational, cultural, scientific, and informational material would still have a Market Dominant mailing option in the form of Media Mail. *Id.* at 15. With regards to small business concerns, the Postal Service again notes that its customer base for BPM Parcels is comprised primarily of large entities, and that it is not aware of any small business shipping providers that offer services that compete with BPM Parcels. *Id.* at 15-16.

The Postal Service additionally explains why BPM Parcels is not subject to the Letter Monopoly, and that with a proposed price increase the transferred product would be in compliance with 39 U.S.C. § 3633 which requires (among related provisions) Competitive products to cover their attributable costs. *Id.* at 16-18.

Finally, the Postal Service argues that the content restrictions on BPM Parcels create arbitrary distinctions within the larger parcel market based on package contents. The Postal Service notes:

From the point of view of the shipper or, indeed, of the consumer, however, there is no difference between carrying (or receiving) a properly packed box containing a few of the latest hardback best sellers and a box of equal size and weight containing personal stationery, apparel and accessories, or household goods, none of which qualify to be shipped using BPM Parcels.

Id. at 19.

B. Procedural History and Motions for Leave to File

The numerous filings in this docket are summarized below by type. Many of these filings were filed untimely and/or out of the regular order, some of which were accompanied by motions requesting the Commission's leave to file. These motions are addressed below.

1. Chairman's Information Requests and Related Motions

Six Chairman's Information Requests (CHIRs) were issued in this docket.⁵ Five of these CHIRs were issued in response to motions for information requests filed by interested parties and the Public Representative.⁶ The Postal Service filed responses to all six CHIRs.⁷ Of particular note, the Postal Service provided market share data for BPM Parcels. Response to CHIR No. 3, question 1. Precise breakdowns for volume and revenue among the products the Postal Service identified as competitors were not available. See *id.* With regards to these identified competitors, the Postal Service estimated BPM Parcel's volume share at 3.8 percent and its revenue share at 0.5 percent. *Id.*

⁵ Chairman's Information Request No. 1, April 14, 2021 (CHIR No. 1); Chairman's Information Request No. 2, April 15, 2021 (CHIR No. 2); Chairman's Information Request No. 3, April 16, 2021 (CHIR No. 3); Chairman's Information Request No. 4, April 16, 2021 (CHIR No. 4); Chairman's Information Request No. 5, April 20, 2021 (CHIR No. 5); Chairman's Information Request No. 6, April 29, 2021 (CHIR No. 6).

⁶ See CHIR Nos. 1-3, 5-6.

⁷ Responses of the United States Postal Service to Questions 1 – 9a and 10 - 12 of Chairman's Information Request No. 1, April 21, 2021 (Response to CHIR No. 1); Responses of the United States Postal Service to Questions 1 – 3a and 4b of Chairman's Information Request No. 2, April 22, 2021; Responses of the United States Postal Service to Questions 1 – 6a of Chairman's Information Request No. 4, April 23, 2021 (Response to CHIR No. 4); Responses of the United States Postal Service to Questions 1 – 6 and 8 – 9 to Chairman's Information Request No. 3, April 23, 2021 (Response to CHIR No. 3); Responses of the United States Postal Service to Questions 3b and 4a of Chairman's Information Request No. 2, April 23, 2021; Responses of the United States Postal Service to Chairman's Information Request No. 5, April 27, 2021; Response of the United States Postal Service to Question 9b of Chairman's Information Request No. 1, April 29, 2021; Response of the United States Postal Service to Question 7 of Chairman's Information Request No. 3, April 29, 2021; Response of the United States Postal Service to Question 6b of Chairman's Information Request No. 4, May 3, 2021; Responses of the United States Postal Service to Chairman's Information Request No. 6, May 6, 2021.

The Postal Service additionally filed several motions for late acceptance of its CHIR responses. United States Postal Service Motion for Late Acceptance of Responses to Questions 3b and 4a of Chairman's Information Request No. 2, April 23, 2021 (USPS Motion); United States Postal Service Motion for Late Acceptance of Response to Question 9b of Chairman's Information Request No. 1, April 29, 2021 (USPS Motion); United States Postal Service Motion for Late Acceptance of Response to Question 7 of Chairman's Information Request No. 3, April 29, 2021 (USPS Motion); United States Postal Service Motion for Late Acceptance of Response to Question 6b of Chairman's Information Request No. 4, May 3, 2021 (USPS Motion). These USPS Motions are granted.

2. Motions for Access to Non-Public Materials

Seven motions were filed seeking access to Non-Public Materials filed in this docket pursuant to 39 C.F.R. § 3011.301.⁸ All seven motions were granted and access provided under the required protective conditions.⁹

3. Timely Comments

The original deadline for public comments in this docket was May 7, 2021.¹⁰ Citing the large number of motions for information requests and the necessity of giving the parties time to review the responses to those information requests, the Commission, on its own motion, extended the comment deadline to May 17, 2021.¹¹ A separate motion to extend the comment deadline was denied as moot.¹² On or before May 17, 2021, 361 timely comments were received, including 356 comments from individual members of the public, joint comments from the Association for Postal Commerce

⁸ Parcel Shippers Association's Motion Requesting Access to Non-Public Materials Under Protective Conditions, April 14, 2021; Parcel Shippers Association's Motion Requesting Access to Non-Public Materials Under Protective Conditions, April 27, 2021; Motion of the Association for Postal Commerce for Access to Nonpublic Materials, April 28, 2021; Parcel Shippers Association's Third Motion Requesting Access to Non-Public Materials Under Protective Conditions, April 30, 2021 (*see also*, Parcel Shippers Association's Notice Concerning Its Third Motion Requesting Access to Non-Public Materials Under Protective Conditions, May 3, 2021); Scholastic Inc.'s Motion Requesting Access to Non-Public Materials Under Protective Conditions, May 3, 2021; Scholastic Inc.'s Second Motion Requesting Access to Non-Public Materials Under Protective Conditions, May 7, 2021; Parcel Shippers Association's Fourth Motion Requesting Access to Non-Public Materials Under Protective Conditions, May 7, 2021.

⁹ Order Granting Motion for Access to Non-Public Materials, April 15, 2021 (Order No. 5872); Order Granting Motion for Access to Non-Public Materials, April 28, 2021 (Order No. 5879); Order Granting Motion for Access to Non-Public Materials, May 3, 2021 (Order No. 5883); Order Granting Motion for Access to Non-Public Materials, May 4, 2021 (Order No. 5884); Order Granting Motion for Access to Non-Public Materials, May 7, 2021 (Order No. 5886); Order Granting Motions for Access to Non-Public Materials, May 10, 2021 (Order No. 5889).

¹⁰ Notice and Order Concerning Transfer of Bound Printed Matter Parcels to the Competitive Product List, March 30, 2021, at 3, 4 (Order No. 5856).

¹¹ Order Extending Comment Deadline, April 29, 2021, at 2 (Order No. 5880).

¹² See Order Denying Motion to Extend Comment Deadline, April 30, 2021 (Order No. 5882).

(PostCom) and the Association of Magazine Media (MPA),¹³ comments from the Parcel Shippers Association (PSA),¹⁴ comments from Uline,¹⁵ comments from Scholastic, Inc. (Scholastic),¹⁶ and comments from the Public Representative.¹⁷

4. Untimely Comments and Related Motions

Reply comments were not permitted on the original procedural schedule. See Order No. 5856. On June 4, 2021, the Postal Service filed reply comments along with a motion for leave to file.¹⁸ This filing triggered several responsive filings, including surreply comments from Scholastic on June 10, 2021, along with a motion for leave to file,¹⁹ and a motion response from PSA on June 11, 2021, that included substantive responses to the USPS Reply Comments.²⁰

The significant volume of post-comment-deadline motion practice and additional comments did not further develop the factual record. Parties' legal arguments must be complete between the initial filing and comments (for the Postal Service) and during the comment period (for all other parties). The continuation of the parties' underlying

¹³ Comments of the Association for Postal Commerce and MPA - The Association of Magazine Media, May 17, 2021 (PostCom/MPA Comments).

¹⁴ Parcel Shippers Association Notice of Filing Material Under Seal and Motion for Non-Public Treatment of Its Comments, Including Attachment A (Declarations), and Workpapers, May 17, 2021 (PSA Comments).

¹⁵ Comments of Uline, May 7, 2021 (Uline Comments).

¹⁶ Comments of Scholastic, Inc. Opposing the Transfer of Bound Printed Matter Parcels to the Competitive Product List, May 17, 2021 (Scholastic Comments).

¹⁷ Public Representative Comments, May 17, 2021 (PR Comments).

¹⁸ Reply Comments of the United States Postal Service, June 4, 2021; Motion of the United States Postal Service for Leave to File Reply Comments, June 4, 2021 (USPS Motion for Leave to File Reply Comments).

¹⁹ Surreply Comments of Scholastic Inc., June 10, 2021; Motion of Scholastic Inc. for Leave to File Surreply, June 10, 2021 (Scholastic Motion for Leave to File Surreply Comments).

²⁰ Response of the Parcel Shippers Association to the Motion of The United States Postal Service for Leave to File Reply Comments, June 11, 2021 (PSA Motion Response).

dispute in successive filings does not aid the Commission's decision-making process.²¹ Accordingly, the USPS Motion for Leave to File Reply Comments and the Scholastic Motion for Leave to File Surreply Comments are denied. The portions of the PSA Motion Response that pertain to the substance of the USPS Reply Comments are deemed moot.

In addition to the 356 timely comments from individuals mentioned in the previous section, 57 individual commenters submitted their comments after the close of the public comment period. These untimely comments are not considered by the Commission.²²

5. Commission Information Request and Related Motions

On August 19, 2021, Commission Information Request No. 1 (CIR No. 1) was issued.²³ CIR No. 1 asked the Postal Service questions concerning BPM Parcels volume shipped in containers other than boxes (e.g., shrink-wrapped and/or strapped parcels, and parcels in containers other than boxes, *hereinafter* "unboxed") that commenters contended were not accepted by UPS and FedEx. CIR No. 1, questions 1-5. Some of the questions pertained to a possible partial transfer of boxed BPM Parcels that would leave unboxed BPM Parcels volume on the Market Dominant product list. *Id.*, questions 3, 5.

²¹ In any event, most of the arguments the Postal Service makes in its unauthorized reply comments respond to issues raised by commenters that the Commission's analysis does not, and need not, reach. Other arguments the Postal Service makes are restatements from its CHIR Responses, repeated in its response to the Commission Information Request discussed in the next section, or else comport with the Commission's analysis below.

²² Even if the Commission were to consider the untimely comments filed by individuals, those comments are similar in substance to the range of timely comments submitted by individuals as described in Section IV.A, *infra*.

²³ Commission Information Request No. 1, August 19, 2021 (CIR No. 1).

The Postal Service filed its response on September 2, 2021, indicating that more than half of BPM Parcels volume is unboxed, but countered the commenters' contention by noting that UPS and FedEx do accept such parcels, subject to an additional handling charge.²⁴ The Postal Service contends that packaging requirements are merely a question of mailability, and are not germane to the determination of a product's market segment. Response to CIR No. 1, questions 1, 3-4. The Postal Service also indicated that it does not consider boxed and unboxed BPM Parcels to be the type of "subclasses or other subordinate units" for which a partial transfer is explicitly authorized by statute. *Id.*, question 3. The Postal Service opposes such a partial transfer on the grounds that the ability to create a new product or class of mail is reserved by statute to the Governors, and that in this particular instance the Postal Service is concerned that a partial transfer could have unintended consequences, such as mailers shifting their packaging material in response to the resulting price signals. *Id.*, question 5.

The Response to CIR No. 1 triggered additional filings from Scholastic and PSA, as well as a response to those filings from the Postal Service. Specifically, on September 8, the Parcel Shippers Association filed surreply comments responding to the Response to CIR No. 1, along with a motion for leave to file.²⁵ Similarly, on September 13, Scholastic filed comments in response to the Response to CIR No. 1, along with a motion for leave to file.²⁶ On September 15, the Postal Service filed a

²⁴ Responses of the United States Postal Service to Commission Information Request No. 1, September 2, 2021 (Response to CIR No. 1). The Postal Service also filed a motion for extension of time to file, which the Commission granted on August 20, 2021. Motion of the United States Postal Service for an Extension of Time to Respond to Commission Information Request No. 1, August 19, 2021; Order Granting Motion for Extension of Time, August 20, 2021 (Order No. 5965).

²⁵ Surreply Comments of Parcel Shippers Association, September 8, 2021 (September 8, 2021 PSA Comments); Motion of Parcel Shippers Association for Leave to File Surreply, September 8, 2021 (September 8, 2021 PSA Motion for Leave).

²⁶ Comments of Scholastic Inc. in Response to the United States Postal Service's Responses to Commission Information Request No. 1, September 13, 2021 (September 13, 2021 Scholastic Comments); Motion of Scholastic Inc. for Leave to File Response, September 13, 2021 (September 13, 2021 Scholastic Motion for Leave).

response to the September 13 Scholastic Comments, along with a motion for leave to file.²⁷

Unlike the untimely comments addressed in the previous section, these filings pertained to the Response to CIR No. 1, which was not a part of the record during the public comment period. Additionally, these responsive filings introduced into the record supplementary factual information not included in the Response to CIR No. 1: the amount of the handling surcharges that UPS and FedEx require to accept unboxed parcels, which range from \$14 to \$16 per piece.²⁸ The amount of surcharge imposed when trying to ship unboxed BPM Parcels volume as UPS Ground or FedEx Ground is relevant because it pertains to product substitutability, which the Postal Service acknowledges is the primary factor for defining a product's market. See Request at 6. Accordingly, the Commission grants the September 8, 2021 PSA Motion for Leave, the September 13, 2021 Scholastic Motion for Leave, and the September 15, 2021 USPS Motion for Leave.

III. HISTORICAL BACKGROUND

As part of the Postal Accountability and Enhancement Act (PAEA), Congress initially specified which products were Market Dominant and which products were Competitive, with both lists subject to any subsequent changes made by the Commission under 39 U.S.C. § 3642.²⁹ Section 3642(a) permits the Commission to,

²⁷ Response of the United States Postal Service to the September 13, 2021, Comments of Scholastic Inc., September 15, 2021; Motion of the United States Postal Service for Leave to Reply to the September 13, 2021, Comments of Scholastic Inc., September 15, 2021 (September 15, 2021 USPS Motion for Leave).

²⁸ September 13, 2021 Scholastic Comments at 2; September 8, 2021 PSA Comments at 1-2.

²⁹ Pub. L. 109-435, title II, §§ 201(a), 202, 120 Stat. 3200, 3205 (2006); see 39 U.S.C. §§ 3621(a), 3631(a).

among other changes to the product lists, transfer products between the Market Dominant and Competitive product lists, subject to the criteria of Section 3642(b).³⁰

Congress specified that “Bound Printed Matter,” which includes BPM Parcels, should initially be placed on the Market Dominant product list. 39 U.S.C. § 3621(a)(7). BPM Parcels is the fifth product the Postal Service has requested that the Commission transfer from the Market Dominant product list to the Competitive product list under Section 3642(b). Request at 1. For context, a brief history of each of the previous four transfer dockets is included below, along with a summary of the origins and evolution of BPM Parcels.

A. Previous Product Transfers

1. Commercial Standard Mail Parcels (MC2010-36)

Commercial Standard Mail Parcels were commercial, bulk lightweight parcels. The Postal Service requested transfer of the entire product to the Competitive product list as Parcel Select Lightweight.³¹ The Public Representative supported the transfer, while PSA and PostCom opposed the transfer.³² Among other concerns, both parties pointed to the Postal Service’s 80 percent market share of under-one-pound parcels, and Postal Service projections that large prospective price increases would not result in

³⁰ For further discussion of the statutory and regulatory provisions applicable to transferring products between the product lists, see Section V.A., *infra*.

³¹ Docket No. MC2010-36, Request of the United States Postal Service to Transfer Commercial Standard Mail Parcels to the Competitive Product List, August 16, 2010, at 1; Docket No. MC2010-36, Supplement to the Postal Service’s Request, November 1, 2010, at 2 (limiting request to Commercial Standard Mail Parcels).

³² See Docket No. MC2010-36, Order Conditionally Granting Request to Transfer Commercial Standard Mail Parcels to the Competitive Product List, March 2, 2011, at 10, 15 (Order No. 689).

substantial volume loss.³³ PSA additionally emphasized that the Postal Service's prices were significantly lower than UPS and FedEx prices. Docket No. MC2010-36 PSA Comments at 6.

The Commission reviewed the proposed transfer by analyzing whether the Postal Service had market power in the lightweight ground parcels market, concluding that it did not. Order No. 689 at 14-15. That conclusion was based on the Postal Service's claimed 79.2 percent market share by volume and 45 percent market share by revenue.³⁴ The Commission noted that the Postal Service's rates for lightweight parcels "are and have been much lower than competitors' rates," but noted that the pricing power this rate difference provided was "illusory based on its pricing under one-pound parcels below cost". *Id.* at 15-16. The Commission concluded that competitors' market share demonstrated a risk of losing a significant level of business as required by the statute. *Id.* at 14-15.

2. Commercial First-Class Mail Parcels (MC2011-22)

Commercial First-Class Mail Parcels were the Commercial Plus and Commercial Base rate categories of the First-Class Mail Parcels product. The Postal Service proposed to transfer these rate categories to the Competitive product list as Lightweight Commercial Parcels.³⁵ The proposed transfer did not include the Retail and Keys and Identification rate categories. Order No. 710 at 2. The requested transfer was unopposed. *Id.* at 6.

³³ See Docket No. MC2010-36, Parcel Shippers Association Comments on the United States Postal Service Request to Transfer Commercial Standard Mail Fulfillment Parcels to the Competitive Product List, September 24, 2010, at 5-6 (Docket No. MC2010-36 PSA Comments); Initial Comments of the Association for Postal Commerce, February 14, 2011, at 2.

³⁴ See *id.* (showing market share of competitors, which is the residual of the Postal Service's market share).

³⁵ Docket No. MC2011-22, Order Adding Lightweight Commercial Parcels to the Competitive Product List, April 6, 2011, at 2 (Order No. 710).

The Commission reviewed the proposed transfer by analyzing whether the Postal Service had market power in the under-one-pound fulfillment parcels market, concluding that it did not. *Id.* That conclusion was based on the Postal Service's claimed 44 percent market share by volume, and 34 percent market share by revenue. *Id.* Although acknowledging the Postal Service's admission that it had captured most of the market share for the 2- to 3-Day air segment of this market, the Commission concluded that these market shares in the under-one-pound parcels market indicated the presence of significant competition in the marketplace.

3. Parcel Post (MC2012-13)

Parcel Post was a ground delivery service for less-than-urgent and oversized packages. The Postal Service proposed to transfer the single-piece Parcel Post rate category to the Competitive product list, keeping the name Parcel Post, while leaving the Alaska Bypass Service rate category as its own product on the Market Dominant product list.³⁶ The requested transfer was unopposed. Order No. 1411 at 5.

The Commission reviewed the proposed transfer by analyzing whether the Postal Service had market power in the retail segment of the ground package market as well as in the broader ground package market, concluding that it did not.³⁷ Describing the parcel delivery market as competitive, the Commission noted Parcel Post's relatively small volume share of the retail segment of 17.6 percent of the ground package market and 1.1 percent of the broader ground package market. *Id.*

³⁶ Docket No. MC2012-13, Order Conditionally Granting Request to Transfer Parcel Post to the Competitive Product List, July 20, 2012, at 1-2 (Order No. 1411).

³⁷ See Order No. 1411 at 6 (referencing market share data discussed on page 5).

4. Retail First-Class Mail Parcels (MC2015-7)

In Docket No. MC2015-7, the Postal Service proposed to transfer to the Competitive product list the remaining two rate categories of First-Class Mail Parcels, Retail and Keys and Identification, for which it had not requested transfer in the Commercial First-Class Mail Parcels case.³⁸ The Public Representative and GameFly opposed the requested transfer. Order No. 2686 at 11-14. Among other objections, both the Public Representative and GameFly argued that private carrier offerings did not provide effective competition due to the substantially higher prices charged by UPS and FedEx and/or different service terms.³⁹

a. Original Denial of Transfer (Order No. 2686)

The Commission initially denied the requested transfer. Order No. 2686 at 1. The Commission observed that the Postal Service had provided market share data for the entire parcels market and the 2-3-Day air and ground parcels market for under-one-pound packages, focusing only on the market for the proposed post-transfer product (which would combine with the rate categories previously transferred in the Commercial First-Class Mail Parcels case) rather than providing market share data specific to the Market Dominant rate categories proposed to be transferred. Order No. 2686 at 17. The Commission also noted that commenters claimed that the proposed market was too broadly defined. *Id.* The Commission denied the requested transfer on the grounds that the Postal Service had not presented adequate evidence sufficient to determine what market the Retail First-Class Mail Parcels operated within. *Id.* at 17-18.

³⁸ See Docket No. MC2015-7, Order Denying Transfer of First-Class Mail Parcels to the Competitive Product Category, August 26, 2015, at 3 (Order No. 2686).

³⁹ *Id.* at 12, 14 (citing to Docket No. MC2015-7, Public Representative Comments, December 17, 2014, at 9 (Docket No. MC2015-7 PR Comments); Docket No. MC2015-7, Comments of GameFly, Inc., December 17, 2014, at 10, 18 (Docket No. MC2015-7 GameFly Comments)).

The Commission discussed issues that created complexity when determining the relevant market segment and indicated the types of information that the Postal Service would need to provide to support its identification of the relevant market segment. *Id.* at 15-21. The Commission cited to Order No. 2306, where the Commission applied antitrust principles when determining the relevant market for a proposed new Competitive product for mailing DVDs that was alleged to be competitive with streaming services and DVD kiosks in the absence of any competing delivery services.⁴⁰

The Commission stated that its denial of the proposed transfer was without prejudice to the submission of a fully supported future request to transfer the product. Order No. 2686 at 25.

b. Remand of Order No. 2686

On appeal of the denial of the Postal Service's request to transfer the Retail rate category, the United States Court of Appeals remanded Order No. 2686 to the Commission for further consideration.⁴¹ The Court noted that the Postal Service had supplied the same type of market share data relied upon when approving previous transfer requests. 842 F. 3d at 1273. The Court explained that by rejecting that data as insufficient the Commission had changed the nature of proof it required to demonstrate a lack of market power in comparison to the previous transfer dockets, while neither acknowledging nor explaining its change in course. *See id.*

The Court acknowledged the expanded market power analysis the Commission had conducted in Order No. 2306, but explained that that order did not announce any overarching change in course by the Commission, and that the unique issues under

⁴⁰ *Id.* at 15, n.27; *Id.* Joint Dissent of Acting Chairman Taub and Vice Chairman Hammond at 6 (providing broader context for Order No. 2306).

⁴¹ *United States Postal Ser. v. Postal Reg. Comm'n*, 842 F.3d 1271 (D.C. Cir. 2016) (Remand). The Postal Service did not appeal denial of the request to transfer the Keys and Identification Devices rate category. *Id.*

discussion in Order No. 2306 made it a distinguishable outlier from the ordinary transfer cases. *Id.* at 1273-1274. The Court noted that the previous transfers were not materially different from the proposed transfer and concluded that the Commission was obliged to “forthrightly distinguish or outrightly reject” its precedent established in the previous transfer orders when deciding to change course. *Id.* As the Commission had not done so in Order No. 2686, the Court remanded the case to the Commission for further proceedings. *Id.* at 1274.

c. Approval of Transfer on Remand (Order No. 4009)

Given the time between the Postal Service’s request to transfer Retail First-Class Mail Parcels and the Remand, 842 F. 3d, the Postal Service filed an update to its original proposal and provided additional information.⁴² The additional information included market share data specific to the Retail rate category of First-Class Mail Parcels, which had not been included in the Postal Service’s original request—only market share data for the combined *post-transfer* product had previously been included. Order No. 4009 at 31-32.

This new data indicated that the Retail rate category of First-Class Mail Parcels comprised, by volume, 1.9 percent of the Entire Parcel market, 8.8 percent of the 2-3-Day and Ground market (under 1 pound), and 2.1 percent of the 2-3-Day and Ground market (up to 70 pounds). *Id.* Based on this data and other updates occurring in the interim between the original proposed transfer and the updated proposal, the Commission found that the Postal Service did not possess market power over the market for First-Class Mail Parcels and approved the transfer. *Id.* at 32-34, 40.

The Commission additionally provided guidance for future transfer proposals, requiring that the Postal Service provide sufficient information “describing the applicable

⁴² Docket No. MC2015-7, Order Conditionally Approving Transfer, July 20, 2017, at 2-3 (Order No. 4009).

market(s), competitors, and similar products to undertake the market power analysis as required by statute.” *Id.* at 29. The Commission noted that, unlike requests to add new or unique products, such as was reviewed in Order No. 2306 using anti-trust principles, there is an assumption for existing products that the product and marketplace are well-understood, effectively reducing the need for the Postal Service to produce evidence to meet its “relatively rigorous” burden of proof. *Id.*

The Commission also re-emphasized that a broad definition of the parcels market is not always helpful, noting that an overly broad market definition can lead to an erroneous market power conclusion given that individual products exhibit different characteristics. *Id.* at 9-10. The Commission further emphasized the need to determine the appropriate market segment for a product in order to provide a more meaningful market power analysis, and that the determination of a product’s market segment is necessarily a fact-based analysis. *Id.* at 11-12. The Commission cited to the Justice Department’s Horizontal Merger Guidelines to support the general market-definition principles that: (1) the market segment should not be defined either too narrowly or too broadly, and (2) some product attributes will be more important than others when evaluating competition.⁴³

B. History of Bound Printed Matter

BPM is a commercial product that dates to 1976 and is an outgrowth of the former fourth-class catalog rate. Request at 2. Fourth-class catalogs were established in 1939 by the Postmaster General as a subclass for larger catalogs. These individually

⁴³ *Id.* at 12. The Horizontal Merger Guidelines cited by the Commission explains that the competitive significance of (conceptually or geographically) more-distant substitutes is apt to be overstated by looking at such products’ share of sales. United States Department of Justice and the Federal Trade Commission, Horizontal Merger Guidelines, August 19, 2010, Chapter 4 (Horizontal Merger Guidelines).

addressed catalogs consisted of 24 or more pages and weighed less than 10 pounds.⁴⁴ Lower rates for such large catalogs were intended to increase the number of catalogs in circulation, which was in turn expected to stimulate demand for First-Class Mail, money orders, and parcel post shipments. *Id.*

Prior to 1976, only bound, printed matter consisting entirely of advertising could be sent at the lower fourth-class catalog rate.⁴⁵ Any bound, printed matter that contained some text and either advertising in part, or no advertising at all, had to be sent Parcel Post at a higher rate. Docket No. MC73-1 Opinion and Recommended Decision at 59. By contrast, lighter catalogs could be sent third-class regardless of whether they contained text in addition to advertising. *Id.* The establishment of BPM rates for fourth-class mail was intended to eliminate that anomaly by amending the fourth-class rate “to include both catalogs and similar bound printed matter.” *Id.*; see *also* Request at 2-3.

In Docket Nos. MC76-3 and MC76-4, which grew out of the first mail classification case conducted under § 3623 of the Postal Reorganization Act of 1970,⁴⁶ the Commission recommended approving the third-class bridge proposal, which was intended to permit both bulk and single-piece third-class catalogs which qualified in all respects but weight to be mailed at fourth-class BPM rates, whenever these fourth class rates were lower.⁴⁷

⁴⁴ Docket No. MC95-1, A History of Mail Classification and Its Underlying Policies and Purposes, July 17, 1995, at 86, available at <https://www.prc.gov/sites/default/files/papers/hist-mail-class.pdf>.

⁴⁵ Docket No. MC73-1, Opinion and Recommended Decision, April 15, 1976, at 59 (Docket No. MC73-1 Opinion and Recommended Decision) available at <https://www.prc.gov/prcarchive/viewpdf.aspx?docid=508240233>.

⁴⁶ Docket No. MC73-1 Opinion and Recommended Decision at 1.

⁴⁷ Docket Nos MC76-3 and MC76-4, Tentative Decision Concerning Mail Order Association of America Proposals to Create a Rate Bridge Between Third-Class Catalogs and Fourth-Class Bound Printed Matter, June 27, 1977, at 14, available at <https://www.prc.gov/prcarchive/viewpdf.aspx?docid=508262561>.

The first BPM rate did not include books unless the books contained “non-incidental” advertising. Request at 3. This stemmed from the Commission’s review, analysis, and recommended opinion on the Meredith Corporation’s proposal.⁴⁸ Docket No. R90-1 saw the Commission remove the aforementioned rules regarding books and BPM pricing, as it was observed that book publishers routinely added advertising to their books to pay the advantageous zoned BPM rates rather than the unzoned “book” rates now known as Media Mail. Request at 3. In Docket No. MC97-3, the Commission increased BPM’s weight limitation from 10 pounds to 15 pounds.⁴⁹

In Docket No. R2000-1, the Standard Mail (B) class was renamed Package Services.⁵⁰ Contemporaneously, classification changes were made to similar products, including Special Standard becoming Media Mail and destination-entered parcel post becoming Parcel Select. Docket No. R2000-1 Opinion and Recommended Decision at ¶ 5747 and ¶ 5800.

In 2007 the Postal Service began transitioning to shape-based rates across multiple classes of mail, differentiating between letter, flat, and parcel-shaped mail.⁵¹ Later that year, the Commission approved differentiation of the BPM Parcels product by shape into BPM Parcels and BPM Flats.⁵² Both BPM Parcels and BPM Flats cannot exceed 15 pounds. The difference is that BPM Parcels may not exceed 108 inches in

⁴⁸ See Docket No. MC76-4, Recommended Opinion and Decision After Exceptions to Tentative Decision Granting the Meredith Corporation Proposal to Allow Enclosure of Multiple Special Purpose Order Forms in Fourth-Class Special Rate Mailings of Books, June 23, 1978, available at <https://www.prc.gov/prcarchive/viewpdf.aspx?docid=508262572>.

⁴⁹ Docket No. MC97-3, Opinion and Recommended Decision Approving Stipulation and Agreement, September 4, 1997, at 1, available at <https://www.prc.gov/prcarchive/viewpdf.aspx?docid=22166>.

⁵⁰ Docket No. R2000-1, Opinion and Recommended Decision Volume 1, November 13, 2000, at ¶ 5747 (Docket No. R2000-1 Opinion and Recommended Decision).

⁵¹ Docket No. R2006-1, Opinion and Recommended Decision, February 26, 2007, at 116-121.

⁵² See Docket No. RM2007-1, Order Establishing Ratemaking Regulations for Market Dominant and Competitive Products, October 29, 2007 (Order No. 43).

combined length and girth while BPM Flats has specific dimension requirements, with the maximum being 15 inches by 12 inches by 0.75 inches. The Package Services write-up in the FY 2007 Annual Compliance Report (ACR) made mention of both shapes,⁵³ but the change did not manifest itself in the Postal Service's workpapers until the FY 2008 ACR.⁵⁴

In Docket No. MC2008-3, the Commission approved the Postal Service's request to require all BPM Flats and BPM Parcels to be paid by permit imprint only.⁵⁵ In the ensuing rate case, the Postal Service stated that "[t]he Postal Service's BPM Flats product is mainly catalogs that are too heavy to qualify as Standard Mail" and "BPM Parcels are mainly books sent by companies in fulfillment of mail orders or by book clubs to regular members."⁵⁶ As emphasized by Uline in its comments, however, BPM Flats and BPM Parcels are distinguished by dimensions rather than content, which will cause Uline's growing product catalog to switch from being shipped as a BPM Flat to a BPM Parcel in 2022, despite being a catalog, as a result of an incremental increase in the height of the spine beyond 0.75 inches. Uline Comments at 1.

Today, BPM Parcels is a parcel-shaped product within the Package Services class with requirements including a weight limit of up to 15 pounds and may only contain printed matter consisting of advertising, promotional, directory, or editorial material (or any combination of such material), including books.⁵⁷

⁵³ Docket No. ACR2007-1, United States Postal Service FY 2007 *Annual Compliance Report*, December 28, 2007, at 11.

⁵⁴ See Docket No. ACR2008, Library Reference USPS-FY08-1 – FY 2008 Public Cost and Revenue Analysis (PCRA) Report, December 29, 2008.

⁵⁵ Docket No. MC2008-3, Order Addressing Proposed Classification Change for Bound Printed Matter, July 16, 2008 (Order No. 89).

⁵⁶ Docket No. R2009-2, United States Postal Service Response to Questions 1-12 of Chairman's Information Request No. 4, March 4, 2009, question 9.

⁵⁷ Request at 3-4; see Section II.A., *supra*.

IV. COMMENTS

Of the 361 timely comments received concerning the proposed transfer of BPM Parcels,⁵⁸ one individual commenter and the Public Representative support the proposed transfer. All other commenters oppose the proposed transfer. The timely comments are discussed below, grouped into four major categories: comments from individual commenters, comments concerning the determination of the appropriate market segment for BPM Parcels, comments regarding the Postal Service's market power, and comments pertaining to the possibility of a partial transfer. Comments that do not fit into any of these categories are discussed at the end of this section.

A. Comments from Individual Commenters

Timely comments were received from 356 individuals. These comments were largely submitted by educators who filed variations on a form letter in support of Scholastic and against the proposed transfer. These letters express concern for the impact on the rates for flyers and books that are mailed to schools.⁵⁹ The letters note that rate increases for BPM Parcels will ultimately be passed on to those purchasing books—students and their families—creating additional barriers to reading. See, e.g., Ake Comment. The educators describe the benefits of being a Scholastic Book Clubs partner for building classroom libraries and providing books as rewards for students who otherwise would not have any new books of their own. See, e.g., *id.* The letters urge the Commission to deny the proposed transfer so that the authors can continue to provide access to books for students and families. See, e.g., Ake Comment.

Fourteen educators submitted brief comments that were not based on the form letter, implicitly opposing the transfer by encouraging the Commission to deny rate

⁵⁸ A total of 363 timely comments were received, of which two were duplicate filings for a total of 361.

⁵⁹ See, e.g., Comment of A. Ake, April 29, 2021, at 1 (Ake Comment).

increases or writing generally in support of Scholastic. Five more educators submitted lengthier comments similarly implicitly opposing the transfer and expressing in greater detail how increased shipping rates for books would negatively impact their students.⁶⁰ Three educators submitted comments explicitly opposing the transfer due to potential negative impacts on students.⁶¹ One educator also implicitly opposed the transfer by emphasizing the importance of reading in education and the role that Scholastic plays in making books accessible to students.⁶²

Unlike the other individual commenters, one commenter expressed implicit support for the proposed transfer by filing comments in this docket encouraging the Commission to approve all necessary rate hikes to maintain the financial health of the Postal Service.⁶³

B. Comments on Market Segment

BPM Parcels operates in a distinct submarket of the broader parcel market.

PostCom/MPA contends that the Postal Service advocates for an overly broad definition of the market for BPM Parcels, ignoring the stringent eligibility requirements a parcel must satisfy to be shipped using the BPM Parcels product. PostCom/MPA Comments at 1-2. PSA similarly points to BPM Parcel's eligibility requirements to argue that the appropriate market segment for BPM Parcels should be only those shipping products that share those same requirements. PSA Comments at 5. PSA further contends that Commission precedent clearly points away from using a broad definition of the parcels

⁶⁰ Comment of C. Bleu, April 28, 2021; Comment of S. Skinner, April 29, 2021; Comment Received from Aura Shirley, April 30, 2021; Comment of K. Rensch, May 6, 2021; Comment of J. Pierce, May 11, 2021.

⁶¹ Comment of P. Geisse-Godt, April 28, 2021; Comment of C. Wiseman, April 28, 2021; Comment Received from Janie Shallow, April 30, 2021.

⁶² Comment Received from Valerie Brandt, April 29, 2021.

⁶³ Comment of Juliette Craig, May 3, 2021.

market when analyzing the market power requirements of 39 U.S.C. § 3642(b)(1). *Id.* at 5, n.12 (citing to Order No. 4009 at 9).

The Public Representative, by contrast, generally agrees with the Postal Service's definition of the relevant market segment for BPM Parcels. PR Comments at 6. He implies that more general-purpose shipping products offered by competitors operate in the same market segment as BPM Parcels because parcels shipped as BPM Parcels can still be shipped by the more general-purpose products. *See id.*

UPS Ground and FedEx Ground are not substitute products for BPM Parcels. Scholastic cites D.C. Circuit precedent for the proposition that the relevant question for determining substitutability is whether differences in price and quality cause purchasers of BPM Parcels—as opposed to the Postal Service—to see two products as not interchangeable.⁶⁴ As such a purchaser, Scholastic notes that for its typical presorted BPM Parcel, UPS Ground and FedEx Ground are approximately three times as expensive as BPM Parcels even before the residential and rural delivery charges imposed by those carriers. *Id.* at 16-17. Scholastic notes that for its typical dropshipped BPM Parcel, the price difference increases to a multiple of 4.5, again prior to surcharges.⁶⁵ Scholastic contends that the additional features provided by UPS Ground and FedEx Ground as part of those products' higher prices do not make the products substitutes for BPM Parcels, but instead only emphasize how different the products actually are. *See id.* at 19. Scholastic also points to the Postal Service's statement that BPM Parcels is predominantly a last-mile delivery product, whereas UPS Ground and FedEx Ground are not.⁶⁶ Scholastic additionally notes that UPS Ground and FedEx Ground do not ordinarily accept unboxed parcels, pointing to the minimum

⁶⁴ Scholastic Comments at 14 (citing to *Arizona Public Service Co. v. United States*, 742 F.2d 644, 652-53 (D.C. Cir. 1984)).

⁶⁵ *Id.* at 17-18. Scholastic notes that it incurs processing and transportation charges with third-party vendors to enter its dropshipped parcels, but contends that this additional cost does not materially affect the comparison. *Id.* at 18.

⁶⁶ *Id.* at 15 (citing to Response to CHIR No. 3, question 5.c.).

additional handling charge of \$14 for unboxed parcels shipped via either company. See Scholastic Comments at 3, 26; September 13, 2021 Scholastic Comments at 2.

Similarly to Scholastic, PSA also points to the price difference between BPM Parcels and UPS Ground and FedEx Ground. PSA Comments at 13. As its example, PSA compares the average revenue per piece for BPM Parcels (\$1.11), to UPS Ground and FedEx Ground which are at least 8.5 times higher without surcharges, ranging up to at least 16 times higher with both residential and rural surcharges. PSA additionally notes that these figures are before the \$14+ surcharges imposed on unboxed parcels for UPS Ground and FedEx Ground, and that such surcharges would apply to more than half of the pieces shipped as BPM Parcels if they were instead to be shipped as UPS Ground and FedEx Ground. September 8, 2021 PSA Comments at 1-2.

Uline notes that BPM Parcels delivery to business customers is made along with the daily mail to the business's front door, whereas UPS and FedEx are instead usually delivered to a freight dock. Uline Comments at 3. Uline states that its catalogs would be far less effective if delivered with packages to its customers' freight docks, meaning that Uline would not consider UPS Ground and FedEx Ground to be effective substitutes for BPM Parcels. *Id.*

The Public Representative, by contrast, cites uncritically to the Postal Service's assertions that UPS Ground and FedEx Ground compete against BPM Parcels for end-to-end (*i.e.*, not dropshipped) parcels. PR Comments at 8.

Hybrid products are not substitute products for BPM Parcels. Scholastic argues that because hybrid products are sold by resellers who enter the resold pieces into the BPM Parcels mailstream, the resellers are selling the BPM Parcels product itself, rather than a competing product. Scholastic Comments at 19. Scholastic further argues that resellers cannot provide effective price competition because they are selling the original product, even if they bundle it with a service of their own. *Id.* at 20. Scholastic notes that for a product to be classified as Competitive, the text of 39 U.S.C. § 3642(b)(1)

requires the risk of losing business to “other firms offering similar products” and that the existence of resellers of the BPM Parcels product itself cannot satisfy that requirement. *Id.* at 19-20.

PSA makes a similar argument, although PSA refers to the sellers of hybrid products as consolidators, rather than resellers. See PSA Comments at 4. PSA notes that consolidators compete with one another for the business of presorting and transporting BPM Parcels to destination postal facilities, and thus do not provide any meaningful competition for the Postal Service’s role of last-mile sorting and delivery. *Id.* PSA includes in their comments a declaration by Gaston Curk, the CEO of OSM Worldwide (OSM), a package consolidator that resells BPM Parcels,⁶⁷ stating that OSM competes not with the Postal Service, but with other consolidators for the business of presorting and transporting BPM Parcels to destination postal facilities. See Curk Declaration of Curk at 2. Curk further states that OSM uses the Postal Service’s Palletized Priority Mail Open and Distribute (PPMOD) service to transport its presorted BPM Parcels volume to destination postal facilities. *Id.* Curk states that OSM would need to pass along to its customers any significant increase in BPM Parcels postage. *Id.*

Media Mail is not a substitute product for BPM Parcels. Scholastic notes that Media Mail is not a similar product offered by another firm for purposes of 39 U.S.C. § 3642(b)(1), because it is offered by the Postal Service rather than by another firm. Scholastic Comments at 20. Scholastic also notes that Media Mail also does not offer dropshipping or zone-based pricing, in addition to costing more. *Id.* at 20-21.

⁶⁷ PSA Comments, Declaration of Gaston Curk on Behalf of OSM Worldwide at 1 (Curk Declaration).

C. Comments on Market Power

Potential in-house diversion demonstrates that the Postal Service lacks market power. The Public Representative argues that the Postal Service has demonstrated that it lacks market power over BPM Parcels. PR Comments at 9. To justify this conclusion, he notes that almost 63 percent of BPM Parcels volume is shipped by logistics companies with their own last-mile delivery capabilities, and thus that volume is at risk of in-house diversion if the Postal Service were to set prices substantially above costs, raise prices significantly, decrease quality, or decrease output. *Id.* He asserts that this potential in-house diversion alone is sufficient to conclude that the Postal Service does not have sufficient market power over BPM Parcels for the product to be classified as Market Dominant. *Id.* at 10.

PostCom/MPA takes a contrary position, noting that the 63 percent of BPM Parcels volume shipped by logistics companies represents the last-mile volume that the logistics companies are paying the Postal Service to deliver despite the existence of their own last-mile capabilities. PostCom/MPA Comments at 5. PostCom/MPA argues that this demonstrates that the logistics companies cannot compete with the Postal Service for last-mile delivery at current rates, and that the Postal Service has not shown how far BPM Parcels rates would have to increase before such in-house diversion becomes cost-effective for those logistics companies. *Id.*

Scholastic connects the Postal Service's argument that potential in-house diversion of hybrid product volume demonstrates a lack of market power to the Postal Service's claim that the hybrid products are in competition with BPM Parcels. See Scholastic Comments at 20. The Commission understands Scholastic to be arguing that such systematic diversion of hybrid product volume would create a new, non-hybrid product, which fails to meet the requirement of 39 U.S.C. § 3642(b)(1) that to establish a lack of market power there will be a risk of losing business to competing "similar products" rather than a risk of losing business to hypothetical new products. See *id.* at 19-20.

Scholastic also notes that the Postal Service's evidence of actual in-house diversion is that UPS retains volume for in-house delivery where it has sufficient delivery density in its own network. *Id.* at 15 (citing to Request at 12). Scholastic argues that potential in-house diversion limited to areas where private carriers have sufficient delivery density would not reduce the Postal Service's market power over BPM Parcels destined to lower-density areas, including the majority of the BPM Parcels pieces that Scholastic ships. *Id.* at 15-16.

Content restrictions on BPM Parcels limit use of market share to gauge market power. The Public Representative cautions against relying on the 3.8 percent market share reported for BPM Parcels by the Postal Service. PR Comments at 11. He notes that this figure was computed by dividing the volume of BPM Parcels by the total combined volume of BPM Parcels with UPS Ground and FedEx Ground. *Id.* He contends that the lack of content restrictions for UPS Ground and FedEx Ground creates a mismatch that makes the market share calculation a potentially misleading measure of market power. *Id.*

The SSNIP test should be applied to current BPM Parcels prices to gauge market power. Scholastic contends that the small but significant non-transitory increase in price (SSNIP) test, should be used to gauge the market power of BPM Parcels. Scholastic Comments at 7. Scholastic cites to D.C. Circuit precedent for the proposition that a 20 percent increase in price is well above the standard usually employed to signal a substantial degree of market power.⁶⁸ The Public Representative disagrees, arguing that the SSNIP test is useful only for defining the market for BPM Parcels, rather than for directly determining market power. PR Comments at 13. Scholastic and the Public

⁶⁸ *Id.* (citing to *CF Industries, Inc. v. Surface Transportation Board*, 255 F.3d 816, 821-24 (D.C. Cir. 2001)).

Representative both cite to Order No. 1448 at 24-25 to support the proposition that the Commission's past discussion of the SSNIP test supports their argument.⁶⁹

The Postal Service has admitted possessing market power in the BPM Parcels market. Scholastic argues that the Postal Service has conceded that it has market power over the BPM Parcels market, citing to the Response to CHIR No. 4, question 3. a., where the Postal Service disavowed claiming a complete lack of market power, emphasizing instead that it has established that the Postal Service lacks monopoly power. Scholastic Comments at 6. Scholastic contends that because the statute refers to market power rather than monopoly power, an admission of market power is fatal to the Postal Service's argument. *Id.*

Demonstrating a lack of market power requires showing that price increases will lead to net contribution decline. PostCom/MPA contends that market power is defined by the ability to profitably raise rates. PostCom/MPA comments at 4. Scholastic is more specific, arguing that the standards of 39 U.S.C. § 3642(b)(1) can only be met if the Postal Service demonstrates that significant price increases would lead to sufficient volume losses to cause a decline in the net contribution of BPM Parcels. Scholastic Comments at 7. Scholastic provides a financial analysis of the material filed under seal to support its contention that the Postal Service has not met this requirement. *Id.* at 8-9.

Accumulated price increase data from previous transfers demonstrates that the Commission's precedent for transfer cases is flawed. PSA argues that nearly 10-years of post-transfer price increase data for Parcel Select Lightweight (PSLW) demonstrate that the Commission's conclusion in Order No. 689 that the Postal Service did not have market power over Commercial Standard Mail Parcels was erroneous. PSA Comments at 5-10. To support its claim, PSA notes that the Postal Service has increased PSLW

⁶⁹ Scholastic Comments at 7, PR Comments at 13, n.19 (both citing to Docket No. MC2012-14 and R2012-8, Order Approving Addition of Valassis Direct Mail, Inc. Negotiated Service Agreement to the Market Dominant Product List, August 23, 2012, at 24-25 (Order No. 1448)).

prices by a cumulative 190 percent post-transfer, and that there is no evidence that business shifted in any meaningful way to UPS, FedEx or other firms offering similar products. *Id.* at 6-8. As further evidence that Order No. 689 was erroneous, PSA notes that when the Commercial Standard Mail Parcels transfer was proposed, the Postal Service stated that transfer would facilitate offering negotiated rates, but that in fact the Postal Service has not signed any agreements offering discounts on the transferred product.

Scholastic makes a similar argument, noting that the Postal Service used the same arguments in support of the previous transfers, but that with the benefit of hindsight it is clear that Commercial Standard Mail Parcels should not have been transferred. Scholastic Comments at 9-10. Like PSA, Scholastic points to the cumulative post-transfer price increase of PSLW, while noting that PSLW volume has grown over the same period. *Id.* at 10-11.

D. Comments on Partial Transfer

Educational bundles should be recognized as a distinct submarket. Scholastic notes that 39 U.S.C. § 3642(c) expressly permits transfer of only part of a product. *Id.* at 23. Scholastic contends that market power over a submarket is thus sufficient to deny the transfer as to the pieces that operate in that submarket. *Id.* Scholastic points to antitrust precedent concerning mergers as supporting the idea that the Commission should make sure that there are no customers who would be unable to avail themselves of competing products offered by other firms. *Id.* Scholastic contends that it would not be able to avail itself of UPS Ground or FedEx Ground for its multi-component educational bundles,⁷⁰ and thus that transfer of BPM Parcels should not be permitted with regards to that submarket, even if the rest of the product is transferred. Scholastic Comments at 23-27.

⁷⁰ See discussion of substitutability of FedEx and UPS Ground at Section IV.B., *supra*.

By contrast, the Postal Service states in a CHIR response that it is not obvious that educational multi-component bundles could stand alone as their own product, noting that a product is defined in statute as a postal service with distinct cost or market characteristics to which a rate or rates may be reasonably applied.⁷¹ Scholastic disputes this claim and argues that the definition of a product is broad enough to include educational multi-component bundles. Scholastic Comments at 26-27.

The Commission cannot or should not approve a partial transfer. The Postal Service also disagrees with Scholastic that the statute allows transfer of only part of a product, instead noting that 39 U.S.C. § 3642(c) refers to the transfer or subclasses or other subordinate units of a class of mail, rather than subordinate units of products. Response to CIR No. 1, question 3. The Postal Service interprets that provision to mean that only transfers of individual products are permitted. *Id.* The Postal Service thus also disputes the appropriateness of a hypothetical transfer of only boxed BPM Parcels, as discussed in detail in Section II.5., *supra*.

PSA agrees with the Postal Service that a partial transfer of the BPM Parcels product would be inappropriate. September 8, 2021 PSA Comments at 1. Unlike the Postal Service, however, PSA argues against a partial transfer to support its argument that the proposed transfer should be denied in its entirety. *Id.*

E. Other Comments

The educational value of BPM Parcels precludes the product's transfer to the Competitive product list. PSA notes that the Commission has held that, among other factors required by statute, the educational value of a product to the public must be taken into account when setting rates for Market Dominant products. PSA Comments at 16. PSA highlights the preponderance of books in BPM Parcels volume to emphasize the product's educational value. See *id.* PSA quotes a letter addressed to

⁷¹ Response to CHIR No. 1, question 10 (citing to 39 U.S.C. § 102(6)).

the Postal Service by members of Congress, the individual commenters in this docket, and a declaration submitted along with PSA's comments to further emphasize the educational value of BPM Parcels. *Id.* at 16-18. If transferred, pricing of BPM Parcels would no longer account for the product's educational value, which PSA characterizes as sufficient reason on its own to reject the proposed transfer. *Id.*

Scholastic makes a related point, observing that Congress both created the initial Market Dominant product list and also emphasized the importance of educational value when it set the standards for reviewing Market Dominant rates. Scholastic Comments at 13.

Industry reliance on existing mail classifications weighs against the proposed transfer. PostCom/MPA notes that businesses have historically been encouraged to develop products based on the unique characteristics of the Postal Service's network and classification system, leading such businesses to be unusually reliant on the Postal Service, and as a result of that reliance would be exposed to considerable business risk by the proposed transfer. PostCom/MPA Comments at 3.

The Postal Service should add a dropshipping option for Library Mail. The Public Representative encourages the Postal Service and the Commission to explore the possibility of adding a dropshipping option for Library Mail to make a better substitute for BPM Parcels volume destined to schools. PR Comments at 17.

V. COMMISSION ANALYSIS

A. Statutory and Regulatory Requirements

Under PAEA, BPM was established as a Market Dominant product by statute, subject to changes by the Commission. 39 U.S.C. § 3621(a). It is part of the Package Services class, along with Media Mail and Library Mail. Requests to transfer a product from the Market Dominant to the Competitive product list are governed by 39 U.S.C. § 3642, which in part (b) establishes three criteria for transfer. First, section 3642(b)(1)

requires that products over which the Postal Service exercises sufficient market power shall be classified as Market Dominant:

(1) The market-dominant category of products shall consist of each product in the sale of which the Postal Service exercises sufficient market power that it can effectively set the price of such product substantially above costs, raise prices significantly, decrease quality, or decrease output, without risk of losing a significant level of business to other firms offering similar products. The competitive category of products shall consist of all other products.

Second, section 3642(b)(2) prohibits products covered by the postal monopoly from being transferred from the Market Dominant product list. Third, section 3642(b)(3) requires the Commission to consider the availability and nature of private enterprises engaged in the delivery of the product, the views of the users of the product on the appropriateness of the proposed transfer, and the impact on small business concerns.

Section 3642 is implemented by the Commission's regulations at 39 C.F.R. § 3040, which governs modifications to the product lists. In pertinent part, 39 C.F.R. §§ 3040.131-132 specify the requirements for the Postal Service's request and its supporting justification. 39 C.F.R. § 3040.134 covers the Commission's possible actions after review, including: approval of the request, instituting further proceedings, providing an opportunity to modify the request, or directing other action as the Commission may consider appropriate.

B. Commission Precedent

As discussed in Section III.A., *supra*, the Commission has previously approved four transfers of parcel-shaped products from the Market Dominant to the Competitive product list. The products in each of the four previous transfer cases were found to operate in (often overlapping) segments of the overall parcel market defined by weight, shipping method and times, and whether the product was specifically used for commercial fulfillment. In each case the Commission concluded, based on a lack of a

dominant market share, that the Postal Service did not exercise sufficient market power for the product to be classified as Market Dominant under 39 U.S.C. § 3642(b)(1).⁷²

The most recent of those four transfer cases concerned Retail First-Class Mail Parcels. See Section III.A.4., *supra*. The Commission originally denied that transfer request after applying a test for market power that it had developed and applied in Order No. 2306, which concerned classification of a new product alleged to be in competition with streaming services and DVD kiosks. *Id.* On appeal, the D.C. Circuit Court explained that the unique issues in Order No. 2306 made it distinguishable from earlier transfer cases, whereas the proposed transfer was not materially different from those prior transfers.⁷³ The Court held that to change course on transfer cases, the Commission was obliged to “forthrightly distinguish or outrightly reject” its prior precedent. *Id.*

The request to transfer BPM Parcels is distinguishable from previous transfer requests by facts in the record showing material differences between BPM Parcels and the previously transferred products. In particular, BPM Parcels has a strict content restriction and, as identified by multiple commenters, most packages shipped via BPM Parcels are ineligible to be shipped via private carriers’ general-purpose shipping products without incurring a separate handling surcharge of over 1,000 percent.⁷⁴ In contrast, all of the previously transferred products lacked significant content restrictions, and typical packages sent via the transferred products were eligible to be shipped using

⁷² See Section III.A.1., *supra* (citing Order No. 689 at 14-15); Section III.A.2., *supra* (citing Order No. 710 at 6); Section III.A.3., *supra* (citing Order No. 1411 at 6); Section III.A.4.c., *supra* (citing Order No. 4009 at 31-34).

⁷³ *Id.*, (citing to *United States Postal Ser. v. Postal Reg. Comm’n*, 842 F.3d 1271, 1273-1274 (D.C. Cir. 2016)).

⁷⁴ September 13, 2021 Scholastic Comments at 2; September 8, 2021 PSA Comments at 1-2.

private carriers' general-purpose shipping products without incurring handling surcharges.⁷⁵

These differences between BPM Parcels and previously transferred products are material to the Commission's review of the transfer request because they suggest that, unlike previously transferred products, BPM Parcels does not actually operate in the same market segment as the general parcel products identified by the Postal Service as being in competition with BPM Parcels. Thus, the evidence in the record suggests that market share figures for BPM Parcels provided by the Postal Service may be calculated in relation to the wrong market segment by including the volume of products that are not actually in competition with BPM Parcels. Notably, even the Public Representative, the only commenter to offer specific support for the proposed transfer,⁷⁶ suggests that the content restrictions on BPM Parcels make the market share figures provided by the Postal Service a potentially misleading measure of market power.⁷⁷

Accordingly, the Commission would be remiss to rely upon those market share figures without further scrutiny of whether the Postal Service has correctly identified the market segment in which BPM Parcels operates. The Commission therefore finds it necessary to conduct an expanded market segment analysis as part of its market power determination in the next section.

⁷⁵ The Postal Service notes that other Postal products, both Market Dominant and Competitive, permit unboxed parcels, and that significant percentages of First-Class Package Service and Priority Mail parcels are unboxed. Response to CIR No. 1, question 1. The Commission observes that even if one or more previously transferred products included some percentage of unboxed volume subject to surcharge if instead shipped via private carriers, that issue was not raised before the Commission when those transfer requests were reviewed.

⁷⁶ One other commenter implicitly supported the proposed transfer, but did so in broad terms supporting price increases in general. See Section IV.A., *supra* (citing to Comment of Juliette Craig, May 3, 2021).

⁷⁷ See Section IV.C., *supra* (citing to PR Comments at 11).

Such an expanded consideration of market segment was not required in previous transfer dockets where identification of each product's market segment was straightforward.⁷⁸ Although commenters in the Commercial Standard Mail Parcels and Retail First-Class Mail Parcels dockets argued that the price of private carrier offerings was comparatively too high to offer effective competition,⁷⁹ no party alleged that the transferred products had incompatible content requirements or that attempting to ship typical packages via private carrier offerings would incur additional handling surcharges on top of the difference in base price. By contrast, both claims have been made in this docket and are supported by the evidence in the record. See Section IV.B., *supra*. Thus, when the record indicates uncertainty regarding the market segment(s) in which a product operates, the Commission considers the expanded market segment analysis conducted below to be a warranted and necessary addition to the brief treatment of market segments in past transfer dockets.⁸⁰

To be clear, the Commission is not applying the detailed market power test based on antitrust principles that was developed in Order No. 2306 to BPM Parcels. As the Court noted in its Remand of the Commission's initial denial of the request to transfer Retail First-Class Mail Parcels, the Commission in Order No. 2306 considered a

⁷⁸ See Section III.A., *supra* (citing to discussions of market segment in past transfer cases). In some instances the Commission never identified as specific market segment for the transferred product, but instead found a lack of market power based on the lack of a dominant market share in all of the suggested market segments. See Section III.A.3., *supra* (discussing transfer of Parcel Post); Section III.A.4.c., *supra* (discussing transfer of Retail First-Class Mail Parcels).

⁷⁹ See Section III.A.1, *supra* (citing to Docket No. MC2010-36 PSA Comments at 6); Section III.A.4, *supra* (citing to Docket No. MC2015-7 PR Comments at 9; Docket No. MC2015-7 GameFly Comments at 10, 18).

⁸⁰ In Order No. 4009, the Commission noted that there is an assumption for existing products that the product and marketplace are well understood. Order No. 4009 at 29; see Section III.A.4.c., *supra*. The mismatch in content requirements between BPM Parcels and UPS Ground and FedEx Ground, along with the information in the record concerning whether or not most BPM Parcels can, in fact, be shipped as UPS Ground and FedEx Ground, demonstrate that this assumption is not always borne out. The Commission re-iterates that determination of a product's market segment is necessarily a fact-based analysis. See Order No. 4009 at 11-12.

unique situation where the alleged competitors to a proposed new Competitive product were not shipping services at all, but were instead streaming services and DVD kiosks. 842 F.3d 1271, 1273. Even with the material differences between BPM Parcels and previously transferred products, the instant request has more in common with previous transfer cases than it does with the unique situation addressed in Order No. 2306. Accordingly, the Commission does not consider it necessary to use the full market power test developed in Order No. 2306 in this proceeding.

The expanded market segment analysis below instead relies upon established Supreme Court precedent from *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962), that determination of the boundaries of a product market depends on evaluating whether products are reasonably interchangeable.⁸¹ The Commission then uses the identified market segment when calculating the Postal Service's market share to determine, as per the Commission's existing precedent, whether the Postal Service exercises sufficient market power over BPM Parcels that the product should be classified as Market Dominant under 39 U.S.C. § 3642(b)(1).

C. Analysis of Proposed Transfer

As discussed above, it is the Commission's responsibility in this docket to decide whether, based on the evidence in the record before it, BPM Parcels meets the criteria of 39 U.S.C. § 3642(b)(1) for transfer from the Market Dominant product list to the Competitive product list. See Section V.A., *supra*. To reiterate, to be eligible for transfer, the Commission must determine that the Postal Service does not exercise sufficient market power over BPM Parcels that it can effectively set the price of such products substantially above costs, raise prices significantly, decrease quality, or

⁸¹ The Postal Service discusses the same reasonable interchangeability standard in its Request. Request at 6 (citing to Order No. 2306). Although the Commission is not applying the full market power test from Order No. 2306, the Supreme Court's precedent on determination of product markets is relevant to both that test and the instant analysis. See Order No. 2306 at 15 (citing to *Brown Shoe* at 325).

decrease output without risk of losing a significant level of business to other firms offering similar products. 39 U.S.C. § 3642(b)(1).

In keeping with Commission precedent for transfer cases, the Commission conducts this determination by looking at the product's market share. See Section V.B., *supra*. As discussed in the previous section, however, material differences between BPM Parcels and previously transferred products require the Commission to conduct an expanded market segment analysis of the market segment in which BPM Parcels operates in order to ensure that BPM Parcels' market share is calculated only in relation to those products that actually compete with BPM Parcels. *Id.*

1. Expanded Market Segment Analysis

The Commission begins its market segment analysis with a recap of the parties' disagreement over the identification of the appropriate market segment for BPM Parcels, and the facts in the record that underlie that disagreement.

Disagreement over the appropriate market segment for BPM Parcels. As quoted in Section II.A., *supra*, in its Request, the Postal Service explicitly claims that any parcel that could be sent using BPM Parcels could alternatively be sent via UPS Ground or FedEx Ground.⁸² Scholastic contends the opposite in its original comments, noting that private carriers have communicated to Scholastic their unwillingness to accept Scholastic's strapped and shrink-wrapped BPM Parcels volume, and that they would only accept boxed shipments.⁸³

In part to resolve this disagreement, the Commission issued CIR No. 1 to get more data on which BPM Parcels pieces are in fact eligible to be shipped via (and as a result, "compete with") UPS Ground and FedEx Ground. See Section II.B.5., *supra*. From the Response to CIR No. 1 and comments filed pertaining to that response, it is

⁸² Request at 7; Response to CHIR No. 4, question 4.a.; see Section II.A., *supra*.

⁸³ Scholastic Comments at 2-3; see Section IV.B., *supra*.

evident that although UPS and FedEx will accept unboxed parcels via their Ground products, such parcels are subject to an additional surcharge of more than ten times the average revenue per piece of BPM Parcels.⁸⁴ Furthermore, the Postal Service estimates that over half of BPM Parcels volume consists of unboxed pieces. Response to CIR No. 1, question 1. Therefore, *most* of the volume shipped as BPM Parcels would be subject to the surcharge if shipped instead via UPS Ground or FedEx Ground, and that surcharge is itself more than 1,000 percent higher than the average price of shipping via BPM Parcels.⁸⁵ The Postal Service argues that commercial customers can negotiate with UPS and FedEx for lower additional handling charges,⁸⁶ but does not provide any evidence suggesting that such reductions would be sufficiently substantial to meaningfully reduce such a large surcharge or that such negotiated discounts would be widely available.

With regards to the content restrictions, there is no factual dispute: the Postal Service and the commenters agree that BPM Parcels has strict content restrictions that the more general-purpose UPS Ground and FedEx Ground products do not share. But as discussed in Section IV., *supra*, the parties draw opposing conclusions regarding the implications of that difference on the identification of the appropriate market segment for BPM Parcels.

Arguing that the content restrictions do not prevent BPM Parcels and UPS Ground and FedEx Ground from operating in the same market segment, the Postal Service notes that despite BPM Parcels' content restrictions, it has more features in

⁸⁴ See Section II.B.5., *supra* (discussing CIR No. 1 and responsive filings); September 8, 2021 PSA Comments at 1 (showing the handling surcharge of at least \$14); Docket No. ACR2020, United State Postal Service FY 2020 *Annual Compliance Report*, December 29, 2020, at 30 (showing BPM Parcels average revenue per piece of \$1.11).

⁸⁵ September 13, 2021 Scholastic Comments at 2; September 8, 2021 PSA Comments at 1-2; see Section IV.B., *supra*.

⁸⁶ Response to CIR No. 1, question 2.

common with UPS Ground and FedEx Ground than it has differences. Response to CHIR No. 4, question 4.a. At the other end of the spectrum, PostCom/MPA argues that ignoring the content restrictions leads to an overly broad definition of the market for BPM Parcels.⁸⁷ PSA similarly argues that the market segment for BPM Parcels should be only those products that share BPM Parcels' content restrictions.⁸⁸

Although the Public Representative cites uncritically to the Postal Service's identification of UPS Ground and FedEx Ground as competitors to BPM Parcels, he explicitly points to BPM Parcel's content restrictions to explain why counting UPS Ground and FedEx Ground volume when determining BPM Parcel's market share would be a misleading indicator of market power.⁸⁹ In essence, he is arguing that the market share data would be misleading because BPM Parcels' share of a combined market for BPM Parcels, UPS Ground, and FedEx Ground would be limited to the fraction of volume in that market that met BPM Parcels' content restrictions. Accordingly, low market share could simply mean that a low fraction of packages meet BPM Parcel's content restrictions rather than being an indicator that the Postal Service lacks market power over the parcels that do satisfy the content restrictions.

Supreme Court precedent. In *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962), the Supreme Court held that: "[t]he outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it." The Court went on to explain how, within a product market, "well-defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes." *Id.* The Court explained that such submarkets may be identified "by examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar

⁸⁷ PostCom/MPA Comments at 1-2; see Section IV.B., *supra*.

⁸⁸ PSA Comments at 5; see Section IV.B., *supra*.

⁸⁹ PR Comments at 8, 11; See Sections IV.B-C., *supra*.

characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors.” *Id.* The Supreme Court has also said that a market “is composed of products that have reasonable interchangeability for the purposes for which they are produced—price, use and qualities considered.”⁹⁰ Below, the Commission examines whether BPM Parcels is reasonably interchangeable with UPS Ground and FedEx Ground.

Determination of the appropriate market for BPM Parcels. Based on the facts in the record, the Commission notes that the Postal Service’s claim that “[a]ny package a customer could send using BPM Parcels, it could, in the alternative, send as a UPS or FedEx Ground package”⁹¹ is true only for customers whose BPM Parcels volume happens to exclusively consist of boxed parcels that would not incur the additional handling fee if shipped via UPS Ground or FedEx Ground or to customers willing to pay a 1,000 percent surcharge. Based on evidence provided by PSA and Scholastic, the record demonstrates that the majority of BPM Parcels packages would be subject to the aforementioned handling surcharge that is greater than 1,000 percent higher than the average revenue of a BPM Parcels piece.⁹² That surcharge is an additional fee, on top of the difference in base price between BPM Parcels and UPS Ground and FedEx Ground.⁹³

Although the Commission has previously approved transfers of Postal Service products with substantially lower base prices than private sector products identified by the Postal Service as competitors,⁹⁴ none of those dockets included an additional, even

⁹⁰ *United States v. E. I. du Pont de Nemours & Co.*, 351 U.S.C. 377, 404 (1956).

⁹¹ Request at 7; see Section II.A., *supra*.

⁹² September 13, 2021 Scholastic Comments at 2; September 8, 2021 PSA Comments at 1-2; see Section IV.B., *supra*.

⁹³ See Scholastic Comments at 17-18; PSA Comments at 13; see Section IV.B., *supra*.

⁹⁴ See Sections III.A.1., A.4., *supra* (describing commenters objecting to the difference in base price between the product proposed to be transferred and private sector products).

larger handling surcharge that would apply to the majority of a the products' pieces if shipped via private carriers' products. And unlike the difference in base price, the additional handling surcharge pays for no additional features when shipping via UPS Ground or FedEx Ground.⁹⁵

The Postal Service's primary counter-argument is its oft-repeated claim that UPS Ground and FedEx Ground are actually substitutes for BPM Parcels. Request at 7; Response to CHIR No. 4, question 4. However, as described above, the Commission finds this claim to be contrary to the evidence in the record indicating that most BPM Parcels volume would incur an effectively prohibitive handling surcharge if instead shipped via UPS Ground or FedEx Ground.

With regards to BPM Parcels' content restrictions, as discussed above there is no factual dispute, only disagreements regarding whether or not those content restrictions influence reasonable interchangeability. The Commission finds persuasive the Public Representative's argument that comparing the market share of BPM Parcels to UPS Ground and FedEx Ground would produce an unreliable measure of market power.⁹⁶ If BPM Parcels were to operate in the same market segment as UPS Ground and FedEx Ground, its content restrictions alone would lead to a low market share, regardless of the Postal Service's degree of market power over the fraction of the market that meets BPM Parcels' content restrictions.

To support its claim that BPM Parcels' content restrictions do not affect the market segment in which the product operates, the Postal Service argues that BPM Parcels has "more features in common than not" with UPS Ground and FedEx Ground. Response to CHIR No. 4, question 4. However, counting the number of features two products have in common and comparing it to the number of features that they do not

⁹⁵ See Request at 7 (arguing that the higher base price of UPS Ground and FedEx Ground pays for additional features not offered by BPM Parcels).

⁹⁶ PR Comments at 11; See Sections IV.B-C., V.B., *supra*.

have in common—in isolation and without regard to other factors—is not an effective way to determine if the products are reasonably interchangeable. Products in different market segments of the same broader market may well have more features in common than not. In *Brown Shoe*, the Supreme Court found that men's, women's, and children's shoes were the relevant lines of commerce, even though all shoes arguably have more features in common with each other than not simply by virtue of being shoes. *Brown Shoe* 370 U.S. 294, 326.

Given BPM Parcels' content restrictions and the prohibitively high surcharges that would be imposed on most BPM Parcels volume if instead shipped via UPS Ground or FedEx Ground, the Commission finds that BPM Parcels is not reasonably interchangeable with UPS Ground and FedEx Ground, and thus does not operate in the same market. Accordingly, based on these distinct prices and characteristics, the Commission finds that BPM Parcels instead operates in a distinct submarket of the general parcels market, one not served by UPS Ground or FedEx Ground.

Additional factor supporting Commission's determination of BPM Parcel's market segment. The Commission's reasoning above is sufficient to support its finding that BPM Parcels operates in a distinct submarket not served by UPS Ground or FedEx Ground. The Commission notes, however, that an additional historical factor reinforces those findings. As discussed in Section III.B., *supra*, BPM Parcels originated from a catalog-specific product that expanded to cover other written materials. The fourth-class catalogs product was specifically intended to be a low-cost method to ship large catalogs that would in turn stimulate volume for other mail products. See Section III.B., *supra*. BPM Parcels' origins as a specialty product with a restricted niche helps explain why BPM Parcels is different from the more general-purpose parcel products. In that context, the Commission's finding that BPM Parcels operates in a distinct submarket accords with the specialized origin of BPM Parcels.

Determination of the appropriate market for hybrid products. As discussed above, the Postal Service says that hybrid product shippers "resell BPM Parcel delivery

to their customers and use the Postal Service for delivery by entering packaging into the mailstream as BPM Parcels.” Request at 8, *see* Section II.A., *supra*. Thus, every piece of hybrid product volume is also a piece of BPM Parcels volume.⁹⁷ An end customer who opts to mail a parcel via a hybrid product rather than via BPM Parcels is therefore still purchasing BPM Parcels, albeit indirectly through a reseller.

Given that purchasing hybrid products includes indirectly purchasing BPM Parcels, the Commission finds that hybrid products must operate in the same submarket as BPM Parcels. Unlike UPS Ground and FedEx Ground, hybrid products necessarily share the same content restrictions as BPM Parcels, and there is no indication in the record that handling surcharges are imposed on unboxed hybrid volume delivered by the Postal Service. However, the same overlap between the products that indicates they operate in the same market segment prevents hybrid products from being a substitute product in the traditional sense of the term, as discussed in the next section.

The Postal Service notes that UPS offers some of its hybrid customers the ability to pay an extra fee to have their packages delivered in-house by UPS, rather than entered into the BPM Parcels mailstream for last-mile delivery. Request at 13. The Postal Service does not contend that such volume is independently sufficient to constitute its own non-hybrid competitor to BPM Parcels, and there is no indication in the record that such volume is anything other than incidental.⁹⁸ Even if such volume were appreciable, it would not be hybrid volume at all, and therefore whether or not it operates in the same market segment as BPM Parcels would need to be determined separately from the hybrid volume. That determination would be based on facts not

⁹⁷ With the limited exception of hybrid pieces currently diverted for in-house delivery by hybrid product resellers, as discussed below. *See also* Section V.C.2., *infra* (discussing market power implications of potential increased *future* in-house diversion of hybrid product volume).

⁹⁸ *See* Request at 12-13 (describing ostensibly hybrid volume delivered in-house by resellers as “often reported anecdotally by package recipients”).

included in the extant record, such as whether UPS permits mailers to pay the additional fee to divert unboxed volume for in-house delivery without charging the additional handling surcharge that would be levied on that volume if shipped in-house via UPS Ground.

2. Market Power Analysis

Having determined that BPM Parcels operates in a separate submarket or segment from UPS Ground and FedEx Ground, and that hybrid products reselling BPM Parcels necessarily operate in the same submarket or segment as BPM Parcels, the Commission now considers whether the Postal Service exercises sufficient market power over BPM Parcels within its submarket to preclude transfer to the Competitive product list under 39 U.S.C. § 3642(b)(1). The Commission begins by addressing commenters' arguments that resellers of a product can't provide effective competition for that product.

Hybrid products that use BPM Parcels for last-mile delivery are not in competition with BPM Parcels. As discussed in Section IV.B., multiple commenters argue that hybrid products are not effective substitutes for BPM Parcels.⁹⁹ The Commission agrees with Scholastic that resellers cannot provide effective price competition because they are reselling the original product, even if they bundle it with a service of their own. See Scholastic Comments at 20. The Commission notes that the additional bundled service offered by some hybrid resellers is limited to consolidation services, as those resellers use other Postal Service products to transport consolidated BPM Parcels volume to destination Postal facilities, where it is then opened and entered into the BPM

⁹⁹ See Section IV.B., *supra* (citing to Scholastic Comments at 19-20; PSA Comments at 4; Uline Comments at 3).

Parcels mailstream.¹⁰⁰ The only service these resellers are providing is consolidation, which the Postal Service does not offer. Even those hybrid product resellers who transport customer packages to destination Postal facilities via their own networks still ultimately enter their volume into the BPM Parcels mailstream.¹⁰¹

Accordingly, purchasing a hybrid BPM Parcels product is indirectly purchasing BPM Parcels through a reseller, preventing the hybrid products from being a true substitute for BPM Parcels. Hybrid product volume is *a*/so BPM Parcels volume, and counting hybrid products as separate competitors would cause the sum of hybrid product volume and BPM Parcels volume to exceed the total volume of unique parcels in this particular submarket.¹⁰² Accordingly, the Commission finds that the hybrid products are not in competition with BPM Parcels, and the hybrid product volume does not constitute an independent share of the total volume of BPM Parcels' submarket.¹⁰³ In other words, the Commission finds that there is no risk of, as required by the statute, "losing a significant level of business to other firms offering similar products" when the

¹⁰⁰ See Curk Declaration at 2 (describing hybrid reseller OSM as using the (palletized) Open and Distribute option available through the Postal Service's Priority Mail product to ship consolidated BPM Parcels volume to destination Postal facilities).

¹⁰¹ Again, excepting the "hybrid" product volume currently diverted for in-house delivery by hybrid resellers with their own logistics networks as previously discussed in Section V.C.1., *supra* and later in this section. See n.97.

¹⁰² See Response to CHIR No. 3, question 1 (showing volume and revenue market shares but noting that BPM Parcels figures include volume data for competitors that use BPM Parcels, volume which was also reported as competitor volume).

¹⁰³ The Postal Service presented mail consolidators as competitors to Commercial First-Class Mail Parcels in a previous transfer case. Order No. 710 at 5. The Postal Service described the consolidators as relying on the Postal Service for last-mile delivery, but the record does not indicate whether the consolidator volume entered the mail as Commercial First-Class Mail Parcels, or as a different Postal product. *Id.* The Commission's order reiterated the Postal Service's claims, but did not specifically address the issue of whether consolidator volume that used the Postal Service for last-mile delivery is a competing product. In that docket, consolidator volume was not a critical component of market share. Even if the consolidator volume had been excluded from the calculation of market share, Commercial First-Class Mail Parcels would have had lower market share than Commercial Standard Mail Parcels which was found eligible to transfer to the Competitive product list. In addition, unlike in the current docket, no party objected to the inclusion of the consolidator volume as separate volume for purposes of calculating Commercial First-Class Mail Parcel's market share.

“other firms” in question are resellers of hybrid products that include BPM Parcels itself. See 39 U.S.C. § 3642(b)(1).

The Postal Service makes several counter-arguments concerning the competition of BPM Parcels with hybrid products that resell BPM Parcels. First, the Postal Service argues that hybrid product resellers are viewed as separate entities and separate market participants. Response to CHIR No. 4, question 3. The Postal Service does not provide specific evidence to support this claim, but even if it were true it would not change the underlying fact that the Postal Service benefits from one or more units of BPM Parcels volume whenever a reseller sells a unit of hybrid volume. Second, the Postal Service argues that Parcel Select is heavily used by resellers, but that it does not follow that Parcel Select is not in competition with those resellers. *Id.* The same logic that prevents BPM Parcels from being in competition with its resellers applies equally to other products—there cannot be a risk of losing a significant level of business to other firms offering similar products when sales of those firm’s products include sales of the Postal Service’s product.

BPM Parcels market share. Having determined that BPM Parcels operates in a separate submarket from UPS Ground and FedEx Ground, and that hybrid products that resell BPM Parcels do not provide effective competition for BPM Parcels, the Commission finds that BPM Parcels operates without effective competition in its narrow submarket. The Commission therefore necessarily finds that the Postal Service has a near 100 percent volume share of the market for BPM Parcels.¹⁰⁴

¹⁰⁴ See Section V.C.1., *supra* (discussing hybrid product volume currently diverted for in-house delivery by resellers, and the lack of evidence in the record as to the amount of such volume). With regards to revenue share, there is insufficient data in the record to calculate the amount of revenue for hybrid products that is not already included in BPM Parcels revenue. Even if it were possible to perform that calculation, a near 100 percent volume share strongly suggests the presence of market power, regardless of the revenue share, as all volume would necessarily be impacted in some form by the Postal Service’s pricing decisions.

As discussed in Section III.A., *supra*, the Commission has relied on a lack of a dominant market share in a product's market segment to approve past transfers. However, in this docket the Postal Service has advanced an alternative argument that potential future in-house diversion of hybrid product volume can establish that the Postal Service lacks market power over BPM Parcels, regardless of market share. See Request at 10-13. The Commission considers this argument below.

Potential in-house diversion of hybrid product volume does not establish lack of market power. The Postal Service argues, with the support of the Public Representative, that hybrid product volume currently entered into the BPM Parcels mailstream by BPM Parcels resellers is at risk of *future* in-house diversion if the Postal Service were to raise prices or degrade service.¹⁰⁵ However, despite the evidence that some degree of such diversion already occurs,¹⁰⁶ there is no data in the record that can be used to determine how much future diversion would occur, or at what price points.¹⁰⁷ To the contrary, as discussed later in this section, the facts in the record suggest that the potential for diversion is significantly lower than the Postal Service suggests.

Hybrid resellers have multiple options for how to respond to higher prices for BPM Parcels. For example, a hybrid product reseller could pass along the higher price for BPM Parcels delivery to the end customer, as the CEO of hybrid reseller OSM says his firm would be forced to do. Curk Declaration at 2. Resellers that currently offer specific customers in-house diversion for a surcharge could similarly pass along the

¹⁰⁵ See Request at 10-13 (showing Postal Service argument); PR Comments at 9-10 (showing Public Representative support); see also Section V.C.1., *supra* (discussing *current* in-house diversion).

¹⁰⁶ See Sections II.A., V.C.1., *supra*.

¹⁰⁷ When the Commission requested any such supporting data, the Postal Service indicated that it had none. Response to CHIR No. 4, question 5. Instead it pointed to earning call statements by FedEx executives saying that FedEx was improving its last-mile delivery density and had previously announced plans as a cost-savings measure to use in-house last-mile delivery in place of purchasing Parcel Select from the Postal Service. The Commission notes that an intention to use in-house last-mile delivery in place of purchasing Parcel Select does not indicate an intention to use in-house last-mile delivery in place of entering hybrid product volume as BPM Parcels.

higher base price and continue to offer in-house diversion for the same surcharge.¹⁰⁸

Or, rather than wholesale in-house diversion, a hybrid product reseller might increase in-house diversion selectively, based on delivery density or other factors.¹⁰⁹

The Commission notes that even if in-house delivery is cheaper than entering the hybrid volume as BPM Parcels, there are any number of plausible business reasons to continue to offer the hybrid product rather than diverting in-house. For example, a hybrid product reseller might consider it more advantageous to maintain a clear separation between its content-restricted hybrid and general-purpose in-house products, particularly if the difference in cost between in-house delivery and BPM Parcels delivery can be passed along to the customer. Neither the Postal Service nor the Public Representative address such possible alternatives to in-house diversion.

Ultimately, to the extent that the hybrid product resellers *do not* divert volume into their own networks, the hybrid product is not in competition with BPM Parcels, as discussed above. To the extent that the hybrid product resellers *do* divert volume into their own networks, they'll have effectively changed what had been a hybrid product into a non-hybrid (*i.e.*, in-house) product. The features and pricing of that transformed product—including whether or not in-house delivery of unboxed volume is subject to the existing unboxed surcharge—depend entirely on the unknowable future business decisions that the current hybrid product resellers make in response to the Postal Service's future pricing decisions.

The Commission has previously emphasized that 39 U.S.C. § 3642(b)(1) requires only a *risk* (as opposed to a certainty) of losing a significant level of business to other firms offering similar products, but that was in the basic economic context of increased prices leading to losing volume to established, identified competitors. Order

¹⁰⁸ See Request at 12 (describing UPS offering in-house diversion for an extra fee to select customers).

¹⁰⁹ See *id.* (describing UPS union contract requiring in-house diversion of hybrid product volume only where delivery density is sufficiently high).

No. 689 at 14-15. Reading the statute to allow a lack of market power to be demonstrated by the *possibility* of another firm introducing what would amount to a new, similar, in-house product in the future would undermine the purpose of the market power test, because, outside of monopoly-covered pieces, there will almost always be at least the possibility of new market entrants. Such an interpretation would mean that only products covered by the postal monopoly would have market power under the meaning of 39 U.S.C. § 3642(b)(1), rendering the provision mere surplusage, as transfer of products covered by the postal monopoly is separately prohibited under 39 U.S.C. § 3642(b)(2). Accordingly, the Commission interprets the risk of loss of volume under 39 U.S.C. § 3642(b)(1) as applying only to existing competing products, and not to the risk of hypothetical new or transformed products.

More concretely in this case, specific facts in the record suggest either an unwillingness or inability of the hybrid product resellers to compete for BPM Parcels volume with in-house products. As discussed in Section V.1., *supra*, the surcharge on unboxed volume makes existing in-house products uncompetitive for the majority of BPM Parcels volume. If the amount of the surcharge reflects the actual cost to UPS and FedEx of servicing unboxed parcels in-house, that suggests that UPS and FedEx do not have the ability to cost-effectively compete for unboxed BPM Parcels volume. If instead the amount of the surcharge exceeds the actual cost of servicing unboxed parcels in-house, which suggests that UPS and FedEx do not desire to compete for unboxed BPM Parcels volume and are setting price signals to discourage that volume.

Either way, the existence and magnitude of the surcharge on unboxed parcels is specific evidence that the risk of in-house diversion of the unboxed portion of BPM Parcels volume may be far less imminent than the Postal Service suggests.¹¹⁰

¹¹⁰ The Commission notes that when he filed his comments agreeing with the possibility of immediate diversion of hybrid product volume, the Public Representative did not have knowledge of the magnitude of the surcharge imposed by UPS and FedEx, nor of the fact that more than half of BPM Parcels volume is shipped unboxed. See PR Comments at 9-10. These facts in the record were established only in response to the later issuance of CIR No. 1.

Therefore, even if a risk of hypothetical new market entrants *could* be sufficient to find that the Postal Service lacks market power over BPM Parcels under 39 U.S.C.

§ 3642(b)(1), the Commission finds that the record in this case supports the conclusion that the risk of in-house diversion of hybrid product volume does not demonstrate such a lack of market power.

The Postal Service has sufficient power over the market for BPM Parcels to preclude transferring the product to the Competitive product list. Having determined that BPM Parcels has a dominant market share of its submarket, and having rejected the Postal Service's alternative argument that it lacks market power over BPM Parcels, the Commission concludes that the Postal Service exercises sufficient market power that it could effectively set the price of BPM Parcels substantially above costs, raise prices significantly, decrease quality, or decrease output without risk of losing significant business to other firms offering similar products. Accordingly, the Commission concludes that BPM Parcels is appropriately classified as a Market Dominant product under 39 U.S.C. § 3642(b)(1) and denies the proposed transfer to the Competitive product list.

D. Potential for Partial Transfer

Because one of the primary factors demonstrating that BPM Parcels operates in a different submarket than UPS Ground and FedEx Ground is particular to the majority of BPM Parcels volume that is shipped unboxed, in CIR No. 1, the Commission asked questions pertaining to a possible partial transfer of boxed BPM Parcels. See CIR No. 1, questions 3-5; Section II.B.5., *supra*. In its Response to CIR No. 1, the Postal Service raised objections to such a partial transfer. See Response to CIR No. 1, questions 3-5. The Commission is persuaded that the risk of unintended consequences resulting from the price signals sent by a partial transfer makes such a partial transfer inadvisable at this time.

Consistent with 39 C.F.R. § 3040.134(c), the Postal Service may, in the future, request a partial transfer of the subset of BPM Parcels pieces which would not be subject to prohibitive surcharges if shipped via UPS Ground or FedEx Ground. If it files such a request, the Postal Service should specifically address whether it exercises sufficient market power over that subset of BPM Parcels to preclude transfer under 39 U.S.C. § 3642(b)(1).¹¹¹

E. Arguments Not Addressed

As discussed in Section IV., commenters raise numerous other arguments for why the proposed transfer should be denied. As the Commission is denying the proposed transfer on the grounds that the Postal Service enjoys a dominant market share within BPM Parcel's submarket and therefore exercises market power over BPM Parcels within the meaning of 39 U.S.C. § 3642(b)(1), the Commission need not, and does not, reach the merits of the commenters' alternative arguments against the proposed transfer.

VI. CONCLUSION

Having determined that BPM Parcels does not have effective competition within its distinct submarket, the Commission finds that the Postal Service exercises sufficient market power over BPM Parcels to preclude transfer to the Competitive product list under 39 U.S.C. § 3642(b)(1). In accordance with 39 C.F.R. § 3040.134(d), the Commission therefore denies the Postal Service's Request.

¹¹¹ The Postal Service may consider requesting further segmentation of the BPM Parcels product based on characteristics of the mail pieces (such as those discovered during the course of this proceeding), potentially allowing for discrete pricing or classification action on those discrete segments.

VII. ORDERING PARAGRAPH

It is ordered:

1. The United States Postal Service Request to Transfer Bound Printed Matter
Parcels to the Competitive Product List, filed March 26, 2021, is denied.

By the Commission.

Erica A. Barker
Secretary